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No. 945

IN THE

SUPREME COURT

OF THE

United States

October Term, 1955

COY BURNETT and MEL DAR CORPORATION,

Petitioners,

vs.

IRELAND GRAVES, J. CHRYS DOUGHERTY and JOE R. GREENHILL, individually and as members of partnership of GRAVES, DOUGHERTY & GREENHILL, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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TOPICAL INDEX

	Page
PETITION FOR CERTIORARI	1
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES, FEDERAL RULES AND REGULATIONS INVOLVED.	4
STATEMENT	4
ARGUMENT	6
I. The Court Below Had No Jurisdiction to Enter the Judgment in Question.	6
II. The Decision of the Court Below Was in Error in Approving the Trial Court's Refusal to Instruct the Jury on the Law of Estoppel	12
III. The Decision of the Court Below Is in Conflict with the Rule That Where a Separate Employment of Attorneys Exist, the Award of a Joint Fee Is Improper. (Glidden v. Gowen, 123 F. 48, 50 (CCA 6th 1903).	14
IV. The Opinion of the Court Below Approving the Trial Court's Withdrawal of Relevant Income Tax Evidence From the Jury Was in Error on the Following Grounds:	15
CONCLUSION	17

Cases

Armour & Co. v. Wantock, 322 U.S. 126, 133, 89 L.ed. 118 (1945)	6
Baltimore Nat. Bank v. Tax Commission, 297 U.S. 209, 215, 80 L.ed. 586 (1936)	8

Page

Baltimore & Ohio R. Co. v. United States, 298 U.S. 349, 368-369, 80 L.ed. 1209 (1936) 13

Chicago & N. W. Ry. Co. v. Green, 164 F. (2d) 55, 61, 63 (CCA 8th 1947) 13

City of Morgantown, W. Va. v. Royal Ins. Co., 337 U.S. 254, 258, 93 L.ed. 1347 (1949) 13

Commonwealth of Massachusetts v. United North and South Development Company, 168 S.W. 2d 226 (Tex. Sup. Ct. 1942) 8, 9

Creal v. Gallup, 231 F. 96, 100-101 (CCA 5th 1916) 12

Erie R. Co. v. Tompkins, 304 U.S. 64 9

Franklin v. Meredith Co., 64 F. (2d) 109, 112 (CCA 2d 1937) 12

Fresh v. Gilson, 16 Pet. 327, 335, 10 L.ed. 982 (1842) 16

Georgia R. & Elec. Co. v. Decatur, 295 U.S. 165, 171, 79 L.ed. 1365 (1935) 16

Glidden v. Gowen, 123 F. 48, 50 (CCA 6th 1903) 14

Guaranty Trust Co. v. York, 326 U.S. 99 9

Hamberlin v. Aston, 267 S.W. 684 (Comm. App. 1924) 8

Hassler v. Shaw, 271 U.S. 195, 200, 70 L.ed. 900 (1926) 10

Home Ins. Co. v. Consolidated Bus Lines, 179 F. (2d) 768 (CA 4th 1950) 16

Home Owner's Loan Corporation v. Creed, 108 F. (2d) 153, 155 (CCA 5th 1939) 10

International Hotel Co. v. Libbey, 158 F. (2d) 717, 720 (CCA 7th 1946) 16

Jefferson County v. Board of County and District Road Indebtedness, 182 S.W. 2d 908 (Tex. Sup. Ct. 1944) 9

Mitchell v. St. Maxent, 4 Wall. 237, 18 L.ed. 326 (1868) 9

Massman v. Snyder, 37 F. (2d) 825, 826 (C.C.A. 5th 1930) 9

Mays v. Lewis, 4 Tex. 1 (Tex. Sup. Ct. 1849) 8

McCandless v. United States, 298 U.S. 342, 346-348, 80 L.ed. 1205 (1936) 16

Page

Morf v. Bingaman, 298 U.S. 407, 414, 80 L.ed. 1245 (1936) 8

National Licorice Co. v. National Labor Rel. Board, 309 U.S. 350, 362, 84 L.ed. 799, 809 (1940) 11

Paramount Film Distributing Corp. v. Applebaum, 217 F. (2d) 101, 123 (CA 5th 1954) 13

Pennoyer v. Neff, 95 U.S. 714, 24 L.ed. 565 (1877) 11

Pfotzer v. Aqua Systems, 162 F. (2d) 779, 783 (CCA 2d 1947) 13

Quon v. Niagara Fire Ins. Co. of N. Y., 190 F. (2d) 257, 260 (CA 9th 1951) 12

Raney v. Barlow, 112 U.S. 207, 28 L.ed. 662, 665 (1884) .. 12

Rosenberg v. United States, 346 U.S. 273, 294-295, 97 L.ed. 1607 (1953) 8

Sanger v. Trammel, 198 S.W. 1175, 1177 (Tex. Civ. App. 1917) 12

Tri-State Motor Corporation v. Standard Steel Car Co., 276 F. 631, 633 (CCA D.C. 1921) 10

White v. Aronson, 302 U.S. 16, 21, 82 L.ed. 20 (1937) 6

Codes, Statutes, etc.

Federal Rules of Civil Procedure, Rules 51 and 61 4

General Counsel Memorandum 45, 1 C.B. 65, Article 201 ..... 4, 16

Texas Constitution, Article I, Section 19 ..... 2, 4, 9

Texas Ins. Code, Art. 7.01, 7.02 ..... 2, 4, 6, 7, 8, 9, 10

Texas Rev. Civ. Stat. Art. 279 ..... 2, 4, 5, 6, 7, 10

United States Constitution:

Fifth and Fourteenth Amendments 2, 4, 10

Seventh Amendment 3, 4

28 U.S.C. 1254 (1) 2

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR CERTIORARI

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit made and entered in the above case on February 13, 1956.

OPINIONS BELOW

The District Court for the Western District of Texas rendered no opinion. Its final judgment (R. 167-170) is reproduced in the Appendix to this petition at page 1. The opinion of the Court of Appeals for the Fifth Circuit made and entered February 13, 1956 is reported at 230 F. (2d) 49 and is reproduced in the Appendix at pages 4-15. Petitioners' Petition for Rehearing to the Court of Appeals for the Fifth Circuit was denied on March 8, 1956, without opinion.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. (a) Whether after removal, a timely motion by a non-resident to quash an attachment for lack of compliance with the special Texas attachment bond statute requiring two good and sufficient sureties (Rev. Civ. Stat. Art. 279), may be properly denied on the ground that the Texas statute governing judicial bonds in general (Art. 7.01, 7.02, Tex. Ins. Code) required but one surety, that such statute controlled the special attachment bond statute without express or implied repeal of the special statute, and that compliance with the requirements of the general statute was sufficient protection to such non-resident; and

(b) Whether the denial of a non-resident's motion to quash the attachment under such circumstances constitutes a denial of due process of law, or equal protection of the laws, under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 19 of the Texas Constitution.

2. Whether it is prejudicial error by the trial court to refuse to give special instructions to the jury correctly stating the law of estoppel, where estoppel is pleaded as an affirmative defense, the evidence is in conflict on the issue, and the issue is not covered in the trial court's other instructions; and whether the withholding of the factual issue of estoppel from the jury under such circumstances constitutes a deprivation of a jury trial on such issue, under the Seventh Amendment to the United States Constitution.

3. Whether it was prejudicial error by the trial court to refuse to give special instructions to the jury correctly stating the law of separate employment, where the undisputed evidence shows the client made separate contracts of employment with several attorneys, the issue was not covered by the court's other instructions, and the jury rendered a lump sum joint verdict in favor of all attorneys against both petitioners.

4. Whether, in an action for the reasonable value of attorneys' services, the trial court's charge to the jury to disregard the impact of income taxes in calculating the benefit secured the client by such services, amounted to plain and prejudicial error, where such instruction restricted the jury's consideration to some $2,000,000 before taxes, instead of the much lower figure of $220,000—$661,344 obtained after payment of income taxes.

5. Whether this decision should be permitted to create a conflict between the Courts of Appeal, and with the appellate courts of Texas.

STATUTES, FEDERAL RULES AND REGULATIONS INVOLVED

The pertinent portions of the Fifth, Seventh and Fourteenth Amendments to the United States Constitution, Article 1, Section 19 of the Texas Constitution, Article 279, Rev. Civ. Stat. of Texas, Articles 7.01, 7.02 of the Texas Insurance Code, Rules 51 and 61 of the Federal Rules of Civil Procedure, General Counsel Memorandum 45, 1 C. B. 65, Art. 201, are set forth in the Appendix at pp. 17-24.

STATEMENT

This case is a classic example of local and sectional prejudice in action. A California resident separately employed several Texas attorneys (who represented him in other matters) to try a case and thereafter to appeal in Texas Courts. (R. 12, 269-272, 441, 496, 499.) He advised the attorneys that the same fee as was paid for trial court services—$15,000—represented his opinion as to a reasonable fee for post-trial services. (Plts.' Ex. 8,[1] R. 280-281.) The attorneys answered that such proposals were "reasonable and fair." (Plts.' Ex. 9, R. 282.) The attorneys thereafter rendered the services in silence regarding their fee, and then for the first time demanded $100,000. (Plts.' Ex. 25, R. 406.) The attorneys sued in the state court in Travis County and attached the non-resident's Nueces County real estate supported by a bond for $200,000 signed by a single corporate surety (Appendix, p. 60) in violation of the Texas attachment bond statute requiring "two good and sufficient sureties". (R. 1, 7-16.) The case was removed by the petitioner Mel Dar Corporation to the United

[1]The exhibits herein were not made a part of the printed record on appeal, but were forwarded to the Fifth Court of Appeal in their original form, and are before this Court in their original form. The more important exhibits, specifically referred to herein have been made a part of the Appendix to this Petition and will be found at pages 67-84 of the Appendix.

States District Court because of diversity of citizenship. After removal petitioner Burnett by special appearance moved that he be dismissed because: (1) he was a non-resident and no service had been made upon him in Texas; and (2) the attachment bond was defective in that it was signed by only one surety (Rev. Civ. Stat. Tex. Art. 279). (R. 28-29.) Subject to the special appearance, he moved to quash the attachment on the same grounds. (R. 30.) Both motions were overruled. (R. 54.) Burnett then answered, subject to the above motions, pleading a general denial and an affirmative defense of estoppel. (R. 33-35.)

During the trial the trial judge: (1) recessed the jury for two weeks; (R. 197), (2) allowed the attorneys repeatedly to call the non-resident Burnett a "California welcher" —thus inflaming the jury against defendant Mel Dar whose first connection with the case started long after the so-called "welching" by the other party defendant occurred; (R. 206, 331-332, 445), (3) refused to instruct the jury on petitioners' sole affirmative defense of estoppel although timely requested (R. 135-136, 141-142), supported by substantial evidence (Plts.' Exhibits Nos. 7 (R. 279), 8 (R. 281), 9 (R. 282), 26 (R. 407), 31 (R. 411), 48 (R. 509), 49 (R. 512), 50 (R. 512); Defts.' Exhibit No. 4 (R. 513); R. 70, 77-87, 412-13 584-586), and not covered by other instructions (R. 159-162); (4) instructed the jury to disregard relevant competent evidence favorable to the non-resident as to the value of the services rendered—one of the main issues of the case; (R. 160, 541, Defts'. Ex. 13), (5) refused to let the jury evaluate each attorney's services separately but required a lump sum verdict; (R. 159-160) and (6) permitted procedures which allowed the attorneys to unduly influence and affect the jury with the cumulative testimony of nine politically prominent local judges and attorneys. (R. 290, 304, 370, 383, 443, 466, 477, 485, 514.)

This combination of errors deprived the non-resident of his property without due process of law and equal protection of the laws, and was a gross and flagrant miscarriage of justice.

These arguments are strong, but no stronger than the record facts. Many of these facts do not appear in the Fifth Court's Opinion. Every opinion must be construed in the light of the facts of the particular case, and its value as a precedent determined on that basis. (*Armour & Co. v. Wantok,* 323 U.S. 126, 133, 89 L.ed. 118 (1945); *White v. Aronson,* 302 U.S. 16, 21, 82 L.ed. 20 (1937).) Therefore, it is peculiarly necessary, in comparing the Fifth Court's decision here with conflicting decisions of this Court and other Courts of Appeal, to have recourse to the important parts of the record which are not in the Fifth Court's opinion. A brief statement of such facts, amply supported by record references, is found in the Appendix at page 25, together with the record of petitioners' objections to the particular incidents.

ARGUMENT

I. The Court Below Had No Jurisdiction to Enter the Judgment in Question.

As heretofore pointed out, the attachment bond herein was signed by but one surety. Petitioner Burnett contends that such bond was fatally defective under Texas law and that no jurisdiction as to him was ever acquired, for the following reasons:

A. The Court Below Applied the Wrong Statute and Thereafter Misconstrued the Plain Language of Article 7.01 of the Texas Insurance Code, Relied Upon by Respondents.

Article 279, Texas Rev. Civ. Stat., provides in part:

"Before the issuance of any writ of attachment,

the Plaintiff must execute a bond, with two or more good and sufficient sureties . . ."

Article 7.01 of the Texas Insurance Code provides in part as follows:

> ". . . When any such bond shall exceed Fifty Thousand ($50,000.00) Dollars in penal sum, the officer charged by law with the duty of approving and accepting such bond may require that such bond be executed by two or more surety companies or by one surety company and two or more good and sufficient personal sureties in the discretion of the principal or official of whom the bond is required . . ."

The attachment bond statute has been on the books for one hundred years, and the general corporate surety bond statute has been in effect for over forty years. When all the Texas statutes were revised in 1925, no relevant change was made in either, and they were both reenacted together by the same legislature.

The Court below applied the wrong statute to the issue when it held that the general judicial bond statute (Art. 7.01) controlled the special attachment bond statute (Art. 279). It compounded this error when it went on to mistakenly say that the "may" in Article 7.01 referred to whether more than one surety was required, and concluded that the "may" was permissive, and hence it was within the clerk's discretion to hold the bond herein (signed by but one surety) sufficient under the statute. (230 F. 2d 49, 57; Appendix, p. 8.)

The plain sense of Article 7.01 is that the court clerk may require two corporate sureties or he may require one corporate surety and two personal sureties.

To hold, as did the Court below, that the clerk at his discretion may allow but one surety does violence to the

plain language involved, writes something into the statute that the Legislature did not intend, and eliminates the added protection Article 7.01 was clearly designed to afford in cases where the bond exceeded $50,000. Such loose construction is in complete disharmony and conflict with Texas statutory construction. (*Commonwealth of Massachusetts v. United North and South Development Company*, 168 S.W. 2d, 226 (Tex. Sup. Ct. 1942).

B. The Court Below Denied Petitioner Burnett's Plea of Lack of Jurisdiction in Conflict With the Decisions of this Court.

A special statute will control a general statute on the same subject, (*Baltimore Nat. Bank v. Tax Commission*, 297 U.S. 209, 215, 80 L.ed. 586 (1936)) and repeals by implication are never favored, especially when "the one act follows close upon the other at the same session of the legislature." (*Morf v. Bingaman*, 298 U.S. 407, 414, 80 L.ed. 1245 (1936).) The Court has called this "a cardinal principle of construction". (*Rosenberg v. United States*, 346 U.S. 273, 294-295, 97 L.ed. 1607 (1953).)

The Court below ignored these settled principles and effected an implied repeal of the special Texas attachment statute by the general surety bond statute, although disclaiming such intent. (230 F. (2d) 49, 57; Appendix, p. 8.)

C. The Court Below Has Decided an Important Question of Texas Law in Conflict with Applicable State Law.

The Texas cases hold that the Texas attachment bond statute must be strictly complied with. (*Mays v. Lewis*, 4 Tex. 1 (Tex. Sup. Ct. 1849) " . . . we cannot regard a bond with but one surety, *however responsible*, as a compliance with a statute which requires two or more sufficient sureties"; *Hamberlin v. Aston*, 267 S.W. 684 (Comm. App.

1924); *Commonwealth of Massachusetts v. North and South Development Company*, 168 SW. 2d. 226 (Tex. Sup. Ct. 1942)—argument that one surety is adequate a "matter primarily for the legislature to determine". See also Appendix, p. 39).[2] This general rule has long been approved. (*Mitchell v. St. Maxent*, 4 Wall. 237, 244, 18 L.ed. 326 (1866) —". . . the law of attachment, being in derogation of the common law, courts are not inclined to extend its provisions beyond the requirements of the statute authorizing it"; *Massman v. Snyder*, 37 F. (2d) 825, 826 (C.C.A. 5th 1930)— ". . . (Texas) attachment proceedings are *stricti juris.*")

In *Jefferson County v. Board of County and District Road Indebtedness*, 182 S.W. 2d 908, 914-915 (Tex. Sup. Ct. 1944), the Supreme Court of Texas spelled out the specificity of statutory terminology necessary for a general statute to effect an implied repeal of a special statute. The Court held that while the words: "shall prevail over any other law, *whether general or special*" did effect an implied repeal, the words: "in the event of a conflict between this Act *and any other Act*, this Act shall prevail" were insufficient to repeal a special statute.

The language of the decision in the *Jefferson County* case quoted above, is decisive and controlling herein. Article 7.01 of the Texas Insurance Code, relied upon by respondents and the courts below, read: "*any statute or law* to the contrary . . . shall be governed by . . . this article . . ." This was clearly insufficient to work an implied repeal of Article 279 governing attachment bonds.

By failing to apply appropriate Texas law to the question before it, the Court below was in error. (*Erie R. Co. v. Tompkins*, 304 U.S. 64; *Guaranty Trust Co. v. York*, 326 U.S. 99.)

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[2]To conserve space, only one or two citations are made herein for each proposition urged, although in many instances the rule involved is well settled by many decisions. The balance of such appropriate citations will be found in the Appendix.

D. The Decision Below is in Direct Conflict with the Decision of the Court of Appeals for the District of Columbia in Tri-State Motor Corporation v. Standard Steel Car Co., 276 F. 631, 633 (C. C. A. D.C. 1921).

E. The Decision Below Is in Direct Conflict with the Court's Own Decision in Home Owner's Loan Corporation v. Creed, 108 F. (2d) 153, 155 (CCA 5th 1939).

F. The Decision Below Deprives Petitioner of His Property Without Due Process of Law, and Equal Protection of the Laws Under the Fifth and Fourteenth Amendments to the Federal Constitution and the Texas Constitution.

1. If, as Petitioner Contends, the Attachment Bond was Fatally Defective, the Trial Court Never Acquired Jurisdiction Over Burnett, and Its Judgment Against Burnett was Void.

It has long been settled that an answer subject to a plea of lack of jurisdiction, as here, does not convert a special appearance into a general appearance, and that the question of lack of jurisdiction can be raised on appeal. (*Hassler v. Shaw*, 271 U.S. 195, 200, 70 L.ed. 900 (1926).)

If, as petitioner contends, the attachment herein was null and void because the bond was defective under either the controlling statute, Article 279—the attachment-bond statute—or Article 7.01, misconstrued by the Court below, then the trial court was completely without jurisdiction to make and enter its judgment (R. 167-170) foreclosing such attachment lien, and the order took petitioner Burnett's property without due process of the law, and equal protection of the laws.

(*Pennoyer v. Neff*, 95 U.S. 714, 24 L.ed. 565 (1877); *National Licorice Co. v. National Labor Rel. Board*, 309 U.S. 350, 362, 84 L.ed. 799, 809 (1940).)

2. Even If the Trial Court Had Jurisdiction to Enter an In Rem Judgment Against the Attached Property, Its Judgment as Worded was In Personam and Hence Exceeded Its Jurisdiction.

The judgment (Appendix, p. 1) was not *limited* or *restricted* to the attached property or to "so much of" the attached property as was necessary to satisfy the indebtedness. A similar attitude was taken by the Fifth Court with respect to costs amounting to many thousands of dollars. (Appendix, pp. 14-15.) Under the circumstances (no service and no appearance by non-resident defendant) such a personal judgment was void, and violated due process of law, as shown by the authorities cited in (1) above.

It is respectfully submitted that non-resident citizens doing business in Texas are entitled to know from this Court whether they may no longer rely upon settled Texas law, but are compelled to speculate as to the independent judgment of the Fifth Court of Appeals upon the construction of the Texas statutes which protect non-residents' property from summary remedies in the absence of strict compliance with such statutes It is further submitted that this question is of sufficient importance to merit review by this honorable Court, since the application of the lower Court's decision to other situations is certain to create great uncertainty among different federal districts and circuits as to the rights of non-resident litigants.

II. The Decision of the Court Below was in Error in Approving the Trial Court's Refusal to Instruct the Jury on the Law of Estoppel.

A. The Decision of the Court Below Is in Conflict with the Applicable Decisions of this Court.

A defendant is entitled to a correct charge on the law applicable to his special defense, and failure to give it is prejudicial error. (*Raney v. Barlow*, 112 U.S. 207, 28 L.ed. 662, 665 (1884); see also, Appendix, p. 47.)

B. The Decision of the Court Below Is in Conflict with Decisions in the Second and Ninth Courts of Appeal and Its Own Earlier Decision Holding that the Question of Whether or Not an Estoppel Exists Is for the Jury Under Proper Instructions.

The cases of *Creal v. Gallup*, 231 F. 96, 100-101 (CCA 5th 1916), *Quon v. Niagara Fire Ins. Co. of N. Y.*, 190 F. (2d) 257, 260 (CA 9th 1951), and *Franklin v. Meredith Co.*, 64 F. (2d) 109, 112 (CCA 2d 1937), all hold that estoppel is a factual question to be determined by the jury under appropriate instructions.

C. Such Determination Is in Square Conflict with Texas Law Regarding the Submission of Properly Pleaded Estoppel to the Jury by Special Instruction. (Sanger v. Trammel, 198 S. W. 1175, 1177 (Tex. Civ. App. 1917). See also Appendix, p. 48.)

D. The Decision of the Court Below Is in Conflict with Decisions by All the Other Circuits that Failure to Submit a Special Defense to the Jury After a Proper, Timely Request Is Prejudicial Error.

(*Pfotzer v. Aqua Systems*, 162 F. (2d) 779, 783 (CCA 2d 1947); *Chicago & N. W. Ry Co. v. Green*, 164 F. (2d) 55, 61, 63 (CCA 8th 1947). See also Appendix, p. 49.)

E. The Decision of the Court Below Is in Conflict with Its Own Earlier Decision in Paramount Film Distributing Corp. v. Applebaum, 217 F. (2d) 101, 123 (CA 5th 1954) which Held That a Party's Theory of the Case Must Be Submitted to the Jury.

F. The Decision of the Court Below Sanctioned the District Court's Departure from the Accepted and Usual Course of Judicial Proceedings,—A Denial of Jury Trial Under the Seventh Amendment and Lack of Due Process, Representing Substantial Error.

(*City of Morgantown, W. Va. v. Royal Ins. Co.*, 337 U.S. 254, 258, 93 L.ed. 1347 (1949); *Baltimore & Ohio R. Co. v. United States*, 298 U.S. 349, 368-369, 80 L.ed. 1209 (1936). See also Appendix, p. 52.)

The trial court's charge to the jury was a mandate to return a verdict for the "reasonable value of the services" despite conduct creating an estoppel. (R. 159.) The jury could well find (and probably did) that the evidence of respondents' failure to "shoot square" with the client was to be completely disregarded as inconsequential.

Petitioners submit that any substantial invasion of the province of the jury by the Court in a diversity case presents a question worthy of review. When to this is coupled the obvious conflict between the decision herein and the decisions of this Court, the other circuits and of Texas courts, certiorari seems necessary and appropriate.

III. The Decision of the Court Below Is in Conflict with the Rule that Where a Separate Employment of Attorneys Exists, the Award of a Joint Fee Is Improper. (Glidden v. Gowen, 123 F. 48, 50 (CCA 6th 1903).)

The Court below approved the trial court's refusal to give a timely requested instruction requiring the jury to fix the reasonable value of each respondent attorney's services (R. 154-156). The jury returned a lump sum verdict for $80,000 in favor of all plaintiffs against both defendants. (R. 159).

It is undisputed that the employment was separate and not joint (R. 12). In view of the very high verdict, and the small proportion of such verdict ascribable to the services of all respondents except Graves (R. 441, 496, 499; Plts.' Ex. 7), the error of the trial court in refusing to require the jury to separately evaluate the services of each respondent attorney is plain. This error masked the fact that Graves was to receive a staggering percentage of the fee, disproportionate to the time and responsibility involved. For all the record indicated to the jury, all the lawyers who worked on the case were to share equally in the fee. It is reasonable to assume that this consideration bulked large in the eyes of the jury and led directly to the enormous verdict.

This error was peculiarly prejudicial as against petitioner, Mel Dar, for whom only a *pro forma* presentation requested by Burnett was made on the appeal (R. 499-500) and this was done by the Corpus Christi lawyers, who valued their entire services at only $7,500 (R. 441).

IV. The Opinion of the Court Below Approving the Trial Court's Withdrawal of Relevant Income Tax Evidence From the Jury was in Error on the Following Grounds:

One of the primary issues of the case was the benefit conferred by respondents' services (R. 15, 16, 160). Petitioners' evidence established the impact of income taxes, (R. 541; Defts.' Ex. 13 (R. 615)) and the resulting *net* benefit. The trial court's peremptory charge to the jury to disregard such relevant evidence (R. 160), was a charge to unreservedly accept the valuation of the benefit by respondents' sole witness (R. 250). Respondents' case was based upon an asserted $2,000,000 benefit, and their witnesses as to reasonable value of the services based their opinion upon a *net* benefit of $2,000,000 to Burnett (R. 303, 401, 475-477, 483-486, 491). Petitioners' evidence would reduce this by two-thirds—a reduction so great as to constitute a failure in proof as to this issue by respondents, especially as against petitioner Mel Dar, since the $2,000,000 was admittedly the valuation of Burnett's interest (R. 250-251), and Mel Dar's interest was much less.

A. Such Determination Is in Conflict with the Long Settled Rule in this Court and Lower Federal Courts That the Court May Not Withdraw From the Jury's Consideration Any Evidence Tending to Establish Material Facts.

(*Fresh v. Gilson*, 16 Pet. 327, 335, 10 L.ed. 982 (1842); *McCandless v. United States*, 298 U.S. 342, 346-348, 80 L.ed. 1205 (1936); *Home Ins. Co. v. Consolidated Bus Lines*, 179 F. (2d) 768, 773 (CA 4th 1950); see also Appendix, p. 56).

B. Such Determination Is in Conflict with the Principle that Income Tax Evidence Is Relevant to Valuation of Property. (International Hotel Co. v. Libbey, 158 F. (2d) 717, 720 (CCA 7th 1946).)

See also: General Counsel Memorandum 45, 1 C. B. 65, Article 201, illustrating the settled practice of the Bureau of Internal Revenue of including income taxes in the valuation of assets by expected future earnings as did the excluded evidence. (Appendix, p. 24.)

C. The Trial Court Withheld Relevant Competent Evidence From the Jury, Thus Depriving Petitioners of the Full Hearing Required by Due Process. (Georgia R. & Elec. Co. v. Decatur, 295 U.S. 165, 171, 79 L. ed. 1365 (1935).)

CONCLUSION

Stripped of all formalism, the question before this Court is whether a non-Texan becomes a second class citizen when he does business in Texas.

For the reasons stated, petitioners pray that the writ of certiorari be granted.

May ....., 1956.

Respectfully submitted,

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